United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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P/S

75-1407

To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

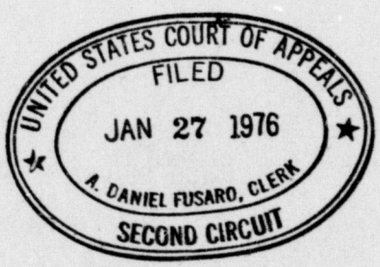
MICHAEL GOGARTY,

Defendant-Appellant.

Docket No. 75-1407

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
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FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether appellant's conviction must be reversed because it was obtained in violation of a deferred prosecution agreement and after the charges against him had been dismissed pursuant to the terms of that agreement.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Kevin Thomas Duffy) rendered on November 25, 1975, convicting appellant Michael Gogarty, after trial without a jury, of assaulting and resisting an officer of the Secret Service (Count II) (18 U.S.C. §111). Appellant was sentenced to a two-year term of imprisonment, which he is now serving.

This Court appointed The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

On March 11, 1973, appellant Gogarty, a chronic alcoholic with psychiatric problems, was arrested by Secret Service agents Thomas Doyle and William Kehoe for threatening the life of President Nixon (18*) on that day. During the course of the arrest, appellant allegedly kicked and threatened the agents.

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*Numerals in parentheses refer to pages of the trial transcript.

The next day,* March 12, 1973, a complaint was filed by Agent Kehoe charging appellant with threatening the life of the President, in violation of 18 U.S.C. §871.** However, on April 23, 1973, a written agreement deferring appellant's prosecution on this charge was executed by defense counsel and Assistant U.S. Attorney Bart M. Schwartz.*** Appellant was released from custody on that day.****

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*After being processed at FBI Headquarters, appellant was taken first to Federal Detention Headquarters at West Street, then to Bellevue Hospital, and then returned to West Street (21, 31-32).

**The complaint is part of Document # to the Record on Appeal. See also U.S. Magistrate's Record of Proceedings - Miscellaneous Docket No. 73 Case No. 335, annexed as "D" to appellant's separate appendix.

***A copy of this document, titled "Provisional Release As Deferred Prosecution," is annexed as "E" to appellant's separate appendix. This agreement suspended the proceedings against appellant for one year to enable him to obtain psychiatric treatment. The agreement required that appellant refrain from certain kinds of conduct and waive certain rights, and imposed affirmative obligations on appellant's activities. Since appellant was acquitted on March 11, 1973, of threatening the President (18 U.S.C. §871) (Count I) -- the charge covered by this deferred prosecution agreement -- the agreement is not of direct consequence here.

****Appendix "D", Magistrate's Record of Proceedings.

On November 7, 1973, Agent Doyle filed another complaint* charging that on March 11, 1973, appellant attacked Doyle as Doyle arrested him for the threatened assault against the President. A warrant for appellant's arrest was issued,** and he was arrested on November 10, 1973.***

On December 20, 1973, another written deferred prosecution agreement was signed by defense counsel**** and Assistant U.S. Attorney David A. Cutner.***** This deferred prosecution agreement related to both charges arising from appellant's conduct on March 11, 1973. The agreement states that the Government's interests and appellant's welfare would best be served by deferring prosecution to allow appellant to participate in an alcoholic treatment program.

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*This complaint is annexed as "F" to appellant's separate appendix.

**The warrant of arrest is part of Document # to the Record on Appeal.

***The record is unclear about the reasons for appellant's arrest in November 1973. Dr. Stanley Portnow's report on appellant's competency, ordered by Judge Lee P. Gagliardi and dated December 1, 1973, states that appellant was arrested on allegations that he was threatening the life of the President. Dr. Portnow's report is part of Document # to the Record on Appeal.

****The agreement was signed by Michele Hermann, Esq., an attorney then associated with The Legal Aid Society, Federal Defender Services Unit, who was not appellant's trial counsel.

*****This deferred prosecution agreement is annexed as "G" to appellant's separate appendix.

The terms of this deferred prosecution agreement imposed certain affirmative responsibilities on appellant's conduct and required that appellant refrain from other activities: he was required to remain hospitalized for as long as his doctor recommended, to participate in any recommended counseling or treatment program, and to communicate with the United States Attorney and his own attorney prior to discharge from in-patient treatment.*

Moreover, the agreement required that appellant refrain from any violation of the State or Federal penal law and from the use of alcohol and drugs except as prescribed. The agreement further provided that the Government could revoke or modify the terms of the agreement or change the period of supervision, and allowed the U.S. Attorney to commence prosecution of appellant within twelve months from the date of the agreement if a violation had occurred. The agreement also stated that upon appellant's compliance with the agreement, "no prosecution will be instituted in this District for the above offenses." As part of the deferred prosecution agreement, appellant waived his speedy trial rights, consented to the adjournment of all pending proceedings, and agreed to

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*By the Government's consent dated January 8, 1974, appellant's release -- presumably from in-patient treatment -- was allowed, but appellant was required to visit and telephone the U.S. Attorney's office periodically. See notation by Magistrate Goettel dated January 8, 1974, on front of complaint dated November 7, 1973. See also Magistrate's Record of Proceedings in Criminal Cases, "J" to appellant's appendix, second side.

permit disclosure to the U.S. Attorney's office of his treatment records.

Subsequently, at the Government's request, the Magistrate dismissed the charges of threatening the President and of assault on July 1 and July 3, 1975, respectively.*

Appellant was again arrested on July 14, 1975, for making a telephone threat on the President's life that day.

Approximately three months later an indictment was filed** charging appellant with three counts of violating Federal law. Count III of the indictment accused appellant of threatening the life of the President on July 14, 1975 (18 U.S.C. §871); Count I, charging a threat on the President's life on March 11, 1973, and Count II, charging an assault on a Federal officer, were based on the charges the Magistrate had earlier dismissed pursuant to the deferred prosecution agreement.

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*See Memorandum to the U.S. Magistrate, dated July 1, 1975, annexed as "H" to appellant's separate appendix; Magistrate's Record of Proceedings, Appendix "D"; Memorandum to the U.S. Magistrate, dated July 3, 1975, annexed as "I" to appellant's separate appendix; Magistrate's Record of Proceedings in Criminal Cases, appellant's separate appendix "J".

**The indictment is "B" to appellant's separate appendix.

A trial was held before Judge Duffy.* Defense counsel,

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*The agents' testimony at trial was that on March 11, 1973, FBI agent Gerald Holland received a telephone call from an individual who identified himself as appellant. This person said he would kill the President unless appellant's brother was released from The Tombs (7). As a result of this telephone communication, Secret Service agents Doyle and Kehoe and New York City police officer Beattie went to appellant's residence at 10:00 p.m. the same day (33). The agents entered appellant's residence, probably with their guns drawn (34), where they saw appellant asleep in his bed (12, 33) in his underwear (33). Agent Kehoe awakened appellant. Without advising appellant of his rights, Kehoe questioned him (13).

In response to this questioning, appellant stated that he had a weapon (18, 28) and that he was going to kill the President. Although the agents found no weapon on the premises (18, 28), appellant was arrested (18).

Further testimony of the agents showed that on that day appellant had been drinking, that his speech was slurred, that he smelled of alcohol, and that he was unsteady on his feet (19, 20, 23, 32). Moreover, the testimony showed that appellant told the agents he was on prescribed medication (24, 36) and that he wanted "help" (36, 38). It is undisputed that, after appellant's 1973 arrests, he received psychiatric treatment (71). Testimony at trial also showed that after arrest and while being transferred to FBI offices, appellant kicked Agent Doyle in the hand and verbally threatened Agents Doyle and Kehoe and Agent Doyle's family (22-23, 32).

Secret Service Agent George Hofmann testified that, on July 14, 1975, he received a telephone call in which the caller stated, "This is Michael Gogarty. I'm going to kill the President of the United States" (41) by blowing the President's brains out. The caller said, "I guess you better come and get me," and revealed his Bronx address (41). Agent Hofmann then went to the given address, which was appellant's home. After questioning, appellant stated he had not made the call (43). After Agent Hofmann told appellant that, under the circumstances, appellant could not be arrested, appellant admitted to the agent that he had telephoned and stated that he wanted to go "downtown" (44, 48). Secret Service Agent Hofmann then arrested appellant.

The testimony showed that on July 14 appellant had been drinking heavily all day and had been taking many pills (60-62). The pills had been obtained pursuant to a prescription by appellant's psychiatrist (62).

who had been appointed pursuant to the Criminal Justice Act,* and Judge Duffy were unaware of the earlier dismissal of the charges arising from appellant's conduct on March 11, 1973. Nor did the Assistant U.S. Attorney inform either the District Court or defense counsel of that prior dismissal of the charges, although Assistant U.S. Attorney Moss did refer to the treatment appellant had received pursuant to the deferred prosecution agreement (69), and although Assistant U.S. Attorney Cutner, who had signed the agreement, was present at trial.

After trial, Judge Duffy acquitted appellant of threatening the President on both March 11, 1973, and July 14, 1975 (Counts I and III), but convicted him of assaulting Secret Service Agent Doyle on March 11, 1973 (Count II).**

On November 20, 1975, appellant was sentenced to a term of imprisonment for two years. He is currently incarcerated, serving that term.

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*Patrick Broderick, Esq., appointed pursuant to the Criminal Justice Act, represented appellant at trial. He filed a notice of appearance on October 16, 1975. See Document #3 to the Record on Appeal. Mr. Broderick was not the attorney who had represented appellant in the earlier proceedings resulting in deferred prosecution and dismissal of the charges.

**Judge Duffy's verdicts are "C" to appellant's appendix.

ARGUMENT

APPELLANT'S CONVICTION WAS OBTAINED IN VIOLATION OF THE TERMS OF HIS DEFERRED PROSECUTION AGREEMENT AND AFTER THE CHARGES HAD BEEN DISMISSED PURSUANT TO THAT AGREEMENT. REVERSAL OF THE CONVICTION IS THUS REQUIRED.

Although the charge of assaulting a Federal agent was dismissed at the Government's request in accord with appellant's deferred prosecution agreement, appellant was nevertheless prosecuted and convicted for that crime. This proceeding was contrary to the terms and purposes of the agreement, was violative of the Government's assurance that appellant would not be prosecuted, and was so unfair as to violate due process. Accordingly, the judgment must be reversed.

Pursuant to a written agreement dated December 20, 1973, the Government deferred appellant's prosecution on charges that he assaulted Secret Service agent Doyle and other agents on March 11, 1973. This assault occurred when appellant, under the influence of alcohol, was being arrested for threatening the life of the President. The deferred prosecution agreement involved here was executed by Assistant U.S. Attorney David A. Cutner* and assigned defense counsel.** The

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*Although Assistant U.S. Attorney Cutner did not question any witnesses at appellant's trial, the trial transcript indicates that he was present during the proceeding.

**Defense counsel, who signed the agreement on appellant's behalf, was not the attorney who represented appellant at trial.

agreement prohibited the Government from commencing any prosecution of appellant based on the offenses involved except during the twelve-month period of supervision and only if a violation of appellant's obligations had occurred. Further, the agreement provided that upon appellant's satisfactory participation in his treatment program, "no prosecution will be instituted in this District for the above offense." In relying on these assurances, appellant waived his right to a speedy trial, consented to the adjournment of all pending proceedings, and permitted disclosure of his treatment records.* It is also undisputed that appellant underwent the psychiatric treatment mandated by the agreement (69, 71-72).

In addition to stating precisely what appellant's obligations were under the agreement, the clear language of that document required the Government to commence any prosecution of appellant on the assault charge within twelve months from the date of the agreement, and then only if appellant's conduct violated the terms of the agreement. After completion of this period of time, the plain language employed in the document barred the Government from prosecuting appellant for the March 11, 1973, assault.

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*Appellant was also required to refrain from violations of Federal and State penal laws and from the use of alcohol and drugs, except as prescribed.

At no time did the Government indicate dissatisfaction with appellant's performance under the terms of the agreement. To the contrary, the charges against appellant were dismissed at the Government's request, more than seven months after completion of the required one-year term of Government supervision, on July 3, 1975.* Satisfaction with appellant's behavior under the agreement resulted in the termination of the proceedings. Since the agreement precludes prosecution after the specified twelve-month period, the subsequent filing of the indictment involving the previously dismissed charges violated the agreement.

In circumstances involving a deferred prosecution, as with guilty pleas, the prosecutor's promise, which induces agreement with consequent waiver of constitutional rights, must be fulfilled. Santobello v. New York, 404 U.S. 257, 262 (1971); United States v. Garcia, 519 F.2d 1343, 1345 (9th Cir. 1975); United States v. Goodrich, 493 F.2d 390, 393 (9th Cir. 1974); United States v. Hallan, 472 F.2d 168, 169 (9th Cir. 1973); Geiser v. United States, 513 F.2d 862 (5th Cir. 1975); Lebosky v. Saxbe, 308 F.2d 1047 (5th Cir. 1975); United States v. Brown, 500 F.2d 375, 377-378 (4th Cir. 1974).

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*Both charges involving appellant's conduct on March 11, 1973 -- threatening the President and assault -- were dismissed. Since appellant was acquitted of threatening the President on March 11, 1973, only the assault charge is directly relevant here.

In United States v. Garcia, supra, 519 F.2d 1343, the defendant was charged with selling marijuana. He executed a deferred prosecution agreement which obligated him to try to produce a drug dealer for the Government within ninety days of the agreement. He also had to waive his rights to a speedy trial. The agreement further provided that if Garcia failed to produce an acceptable dealer, the Government could seek an indictment within one hundred-fifty days of the agreement. Garcia did not produce a dealer. On the one hundred fifty-ninth day after the agreement was signed, an indictment was filed charging Garcia with the earlier sale of marijuana. Id., 519 F.2d at 1344.

The Ninth Circuit, flatly rejecting the Government's claims that the defendant had made no effort to fulfill his part of the agreement and that it had sought the indictment at the earliest available opportunity, vacated Garcia's conviction with instructions to dismiss the indictment, stating:

> "... [W]hen the prosecution makes a 'deal' within its authority and the defendant relies on it in good faith, the court will not let a defendant be prejudiced as a result of that reliance."
>
> Id., 519 F.2d at 1393, quoting from United States v. Goodrich, supra, 493 F.2d at 393.

Santobello v. New York, supra, 404 U.S. at 262.

The principle of Garcia is particularly appropriate here, for the Government, recognizing appellant's compliance with

the agreement, successfully obtained the dismissal of the charges in satisfaction of its obligations under the agreement. The Government's promise not to commence prosecution should be enforced.

Not only does the language of the agreement preclude resurrection of the relevant charge, but the commentators and applicable proposals confirm the fact that the expectations of the defendant, counsel, and others concerned with the agreement, including the Government, assume that the charges will be dismissed with prejudice.

Standard 2.2(6) of the National Advisory Commission, Criminal Justice Standards and Goals, Courts, ch.2 (1973) (hereinafter "Report on Courts") states:

> Upon expiration of the agreement, the court should dismiss the prosecution and no future prosecution based on the conduct underlying the initial charge should be permitted.
>
> Id., quoted in National Pretrial Source Book in Pretrial Criminal Justice, Intervention Techniques and Action Programs, compiled by National Pretrial Intervention Center of the ABA Commission on Correctional Facilities and Sevvices (1975) (hereinafter "National Pretrial Sourcebook").

The commentary to the Standard provides:

> Final dismissal "with prejudice," as provided in subparagraph 6, is undoubtedly an understood provision of all suspension agreements.
>
> Standard 2.2, Commentary, quoted in National Pretrial Sourcebook, at 148.

The ALI Model Code of Pre-Arraignment Procedure, Proposed Official Draft (hereinafter "ALI Model Code") contains a similar provision barring prosecution after dismissal. Section 320.8(6). See also Proposed Federal Legislation, Report on S.798, quoted in National Pretrial Sourcebook, at 122. Proposed House Bill, H.R.9007 (91st Cong., 1st Sess.), states that "dismissal shall forever bar prosecution for the offense charged, any offense based on the same conduct or arising from the same criminal episode." Id., quoted in National Pretrial Sourcebook, at 131.

Further, since deferred criminal prosecution or diversion has become an accepted and essential method of disposing of cases in the criminal justice system, it is contrary to that purpose to permit the charges to be revived.* Diversion has been designed in part as an economical and efficient response to those offenders whose welfare and that of society is best served by required participation in a flexible rehabilitative

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*See generally National Pretrial Monograph on Legal Issues and Characteristics of Pre-trial Intervention Programs, prepared by National Pretrial Service Center of the ABA Commission on Correctional Facilities and Services (1974) (hereinafter "Monograph on Legal Issues"); National Pretrial Source Book in Pretrial Criminal Justice, Intervention Techniques and Action Programs, compiled by National Pretrial Intervention Center of the ABA commission on Correctional Facilities and Services (1975) (hereinafter "National Pretrial Sourcebook"); ALI Model Code of Pre-Arraignment Procedures, Proposed Official Draft, Article 320 (1975); National Advisory Commission on Criminal Justice Standards and Goals, Courts, ch.2 (1973) (hereinafter "Report on Courts"); Report on Activities, June 1973-October 1975, United States Attorney, Southern District of New York.

program and without the attachment of a criminal conviction. See Report on Courts, supra, quoted in National Pretrial Sourcebook, supra, at 134-135. Most importantly, deferred prosecution broadens the resources and types of treatment which can be utilized to provide the most beneficial setting for rehabilitation. National Pretrial Sourcebook, supra, at 134-135.

At the time of appellant's agreement and dismissal of the charges against him, appellant's case fit within these guidelines, and deferred prosecution was clearly the appropriate response to appellant's acts.* Although the disposition of this case and the dismissal of the charges may, in retrospect, seem unwise to the Government, this can neither vitiate the Government's original agreement nor its conduct pursuant thereto.

The question of the invalidity of appellant's conviction was not raised at trial. Defense counsel, who had not

*In discussing the merits of deferring the prosecution of an individual with problems similar to appellant's, a former U.S. Attorney for the Southern District of New York has stated:

> [Participation in a deferred prosecution program] is obviously a humane and just way to deal with such persons and in my judgment is superior to the former method of automatically prosecuting the defendant, perhaps repeatedly, and leaving to the sentencing court the burden of evaluating an appropriate sentence.
>
> Report of Activities, June 1973-October 1975, United States Attorney, Southern District of New York, at 16-17.

represented appellant on any prior occasion, did not know that the deferred prosecution agreement to which Agent Kehoe referred (72)* included the assault charge and that it had been dismissed. Although the Government knew this to be the fact, and referred to the treatment appellant received as a consequence of the agreement (69), inexplicably Assistant U.S. Attorney Cutner, who signed the agreement and was present at trial, informed neither the District Court nor defense counsel of the circumstances involved. In light of these facts and the Government's conduct, the failure at trial to raise the issue of appellant's deferred prosecution agreement and the dismissal of the charges pursuant thereto, does not constitute a waiver of this issue, and it may be raised here. United States v. Tramunti, 500 F.2d 1334, 1340-1342 (2d Cir. 1974).

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*This reference occurred during defense counsel's attempt to show that appellant's problems were psychiatric, not criminal, that appellant had been treated by a psychiatrist from 1972-1975, and that the Government was aware of this (68-72).

CONCLUSION

For the foregoing reasons, the judgment of conviction must be reversed and the case remanded with instructions to dismiss the indictment.

Respectfully submitted,

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Certificate of Service

January 27, 1976

I certify that a copy of this brief ~~and appendix~~ has been mailed to the United States Attorney for the Southern District of New York.

Nathan J. Silberman